No. 3902.

In the United States

Circuit Court of Appeals

For the Ninth Circuit

DAVID TAYLOR, Appellant,,

vs.

Nevada Humboldt Tungsten Mines Company, a corporation, Tungsten Products Company, a corporation, Mill City Development Company, a corporation, W. J. Loring, C. W. Poole, R. Nenzel, H. J. Murrish, L. A. Friedman, C. H. Jones, G. K. Hinch, J. T. Goodin, V. A. Twigg, J. C. Huntington and Lena J. Friedman, individually, Appellees.

Closing Memo Brief of Appellees Other Than W. J. Loring

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Since the oral argument on November 13, 1923 was had before the Court, appellant has served and presumably filed, a so-called "Reply Brief".

Certain contentions are therein advanced to which we wish briefly to reply.

On pages 3-4 counsel say the stockholders meeting on August 23, 1919 was a direct violation of Section 96, Nevada General Corporation Laws, which purports to authorize a corporation to sell all of its assets on a vote of 60% of its outstanding stock at a meeting held on at least fifteen days notice, and counsel argue that because the August 23rd meeting of stockholders of Nevada Humboldt Tungsten Mines Company and the other two companies was held on seven days notice, the contract of sale to Loring was void, etc.

A sufficient answer to the foregoing is that Loring contract **did not embrace all of the assets** of the corporations, as the contract (Rec. 869) specifically excepted certain property worth from about $500.00 to over $1,000.00 and in addition excepted also the corporate books and franchises.

Counsel say (Rep. Br. 7) that we have omitted any attempt to establish truth of representations in letters and telegrams sent by defendants to Taylor prior to April 2, 1919. One answer to this is that **there is no evidence** in the record showing such representations were untrue. Plaintiff is on this point absolutely forced to rely solely on Bancroft's report (Plate 5-A, Rec. 1507) and we say that so far from that report showing such repre-

sentations untrue, they confirm the correctness of such representations. The main attack is directed to Nenzel's telegram of February 23, 1919, copied in letter of February 24, 1919 (Rec. 783). In appellant's opening brief (page 32) counsel concede correctness of the finding of the trial court as to items 6 and 7 stated in said telegram, as said items were numbered by the trial court (Rec. 1424). We will, therefore, consider only the remaining items of Nenzel's telegram.

ITEM 1.

> "The number one drift south is eighty-five feet beyond granite dyke Ore low grade".
>
> The trial court says (Rec. 1425):
>
> "Tested by Bancroft's assays Item 1 is correct."

Counsel, however, insist (Op. Br. 27, Rep. Br. 7) that the trial court was in error because the **average** of Bancroft's assays (Plate 5-A, Rec. 1507) taken over the **entire 85 feet** of drift, gives an average of only 22%WO3, and counsel say (Op. Br. 28) Nenzel was in error in referring to this as "low grade" and say 22% is no ore and worthless. But there is no evidence onywhere in the record as to what percent tungstic acid the rock must carry in order to be considered "low grade". We say counsel's unsupported statement that 22% rock is worthless, and that Nenzel in referring to it as "low grade" is, therefore, guilty of mis-

representation, can not be considered as evidence at all, and certainly not against the positive finding of trial court that "tested by Bancroft's assays" Nenzel's said statement as to "low grade" is correct. Further, according to Bancroft's said plate at a point on drift about 70 feet out, the ore was very rich and ran 3.70%. Nenzel did not say the **average for entire 85 feet** or for any number of feet of drift showed ore of low grade, or of any grade. He may have referred to the ten or fifteen feet nearest the breast, over which distance the average was 1.31% according to plaintiff's own witness Bancroft. But whether we take only the last 15 feet or so, which probably covered the point where breast of drift was at the time Nenzel wired, or whether we take average of the entire 85 feet of drift as "low grade", we say tested by Bancroft's assays, Nenzel was telling the absolute truth and the said finding of the trial court to that effect was right, and the only one that could have been made under the undisputed evidence.

ITEM 2.

> "Drift number one sixty feet beyond Bancroft sampling stop Number two south tunnel sixty feet beyond Bancroft sampling Value of ore one and one-half percent stop."

As to this item the trial court found (Rec. 1425):

"Bancroft's assay taken sixty feet beyond his first sampling in number two south was 2% instead of 1.50%".

Nenzel was undoubtedly talking about the grade of the ore found at the point in drift as indicated by him, viz 60 feet beyond Bancroft's first sampling, and at that point the ore was actually 2% according to the plaintiff's witness Bancroft, instead of 1.50% as stated by Nenzel. Nenzel says absolutely nothing about the **average** grade of the ore over the sixty feet of drift, which counsel insists (Op. Br. 28) should be read into Nenzel's telegram, and then because such **average** is only .63% as found by the trial court (Rec. 1425) that Nenzel's telegram, as so reconstructed, should convict him of falsehood.

ITEM 3.

"Number two north two hundred and seventy-five feet from shaft average width of vein nine feet Ore milling one per cent stop.

As to this the trial court's finding is (Rec. 1425):

"Bancroft's assay taken 275 feet north from the shaft in number 2 was 1.60% instead of 1%."

Counsel (Op. Br. 29) attacks Nenzel's statement as to 1% ore at a point 275 feet north of shaft, and attacks Court's findings supra that at a point Nenzel referred to, the ore was 1.60% instead of 1% as stated by Nenzel, and counsel say the Ban-

croft report shows sixteen samples taken by him on this drift covering some 128 linear feet, and that the average was 34% and after they have so reframed and reconstructed Nenzel's telegram and because Nenzel's statement as to value does not square up with the reconstructed telegram, they say his statement is untrue and court's finding is wrong. But inasmuch as Nenzel's statement is undoubtedly directed to a specific point, i. e. 275 feet North of shaft, we say it is manifestly unfair to attempt to spread his statement generally over portions of drift as much as 128 feet distant from the point Nenzel was actually talking about. If as counsel contend, the 275 feet point is to be disregarded and average values in the drift is to be taken to test truth of Nenzel's statement, then why do not counsel take the entire 275 feet instead of only 128 feet thereof covered by the Bancroft last sampling? In the portion of the drift so excluded by counsel, Bancroft finds values of 2.05%, 2.25%, 1.55%, 1.15% etc. The only "average" in this item mentioned by Nenzel is as to the width of vein and this average undoubtedly referred to the vein as found in immediate proximity of the 275 feet point at or very near which precise point Bancroft's plate shows vein to be about 4½ feet in width. But that this vein is strangely erratic as to width (as well as values) is convincingly shown by the Bancroft report, for in this very drift he

finds vein to be 7.3 feet at one point, and only 10 feet distant he finds it to be but 2.8 feet; at another 5.3 feet and 10 feet distant only 0.75 feet; at another 5.33 feet and only 10 feet away but 1.7 feet. Hence the vein may very well have been 9 feet just as Nenzel said between some of the points where it was actually measured by Bancroft. Bancroft's report does not pretend to say vein was not 9 feet wide at **any** point, but only what his samples were at **fixed points** taken by him 10 feet apart. If therefore, the vein admittedly varied at widths as much as nearly 5 feet in a distance of 10 feet, how can this court or any one say it may not have varied 4 or 4½ feet **between** the Bancroft points and Nenzel be entirely correct in his 9 feet statement, based as it undoubtedly was on the width of vein at or near the then breast of the working. Bancroft's Plate 5-A first figures merely give **width of sample**, i. e. length of his sample cut (Rec. 237-241) and hence, not necessarily **width of vein at all.** Hence we say the attack on the trial court's finding as to this item is without any merit whatever.

ITEM 4.

> "Number two south one hundred feet beyond Bancroft's sampling Average width of vein four and one-half feet Value of ore one and one-half percent stop."

As to this the trial court finds (Rec. 1425) that

this item was inaccurately designated and no further finding is made regarding it, and counsel say (Op. Br. 31) that said statement of the trial court is correct.

ITEM 5.

> "Number three north drift sixty feet from shaft vein ten feet wide Value of ore one and one-half per cent stop."
>
> As to this item the trial court says (Rec. 1425):
>
> "Bancroft's nearest assays sixty feet north on number three were 1.20% and 1.35% instead of 1.50%. Five assays taken by Bancroft within sixty feet from shaft averaged 1.89%."

Counsel (Op. Br. 31) say that **average** of ore over forty feet of drift, i. e. five of Bancroft's samples, is 1.92%, but that according to Bancroft, the **average width** of vein over these sixty linear feet is only 6.51 feet. But Nenzel does not say **average** width is 10 feet and Bancroft's plate 5-A shows that at sixty foot point the vein is 6 feet wide and about sixteen feet beyond is **9.4 feet** wide. So Nenzel was substantially correct, even tested by Bancroft's measurements. Here also from Bancroft we find near this very point that in 10 feet this erratic vein widens from 4.33 to 9.4 wide. Moreover inasmuch as Nenzel's statement as to value of 1.50% at a given point in drift, is substantially exceeded by the Bancroft finding of 1.92% for

the average in that part of the drift, the **excess value** would doubtless more than compensate even if there was a **loss in width** as claimed.

The foregoing establishes that even tested by Bancroft, Nenzel's wire of February 23, 1919 is as nearly correct as can reasonably be expected. No two expert mining engineers will get precisely the same results and Nenzel was not even a mining engineer or a miner at all, but simply a young man who did the bookkeeping and only some of the correspondence for the company. He obtained his figures from Morrin, the mine superintendent and Morrin's estimates as to widths and values were obtained from pannings and mill returns and not from close assays, and Taylor was advised of this prior to and at the Denver conference. Bancroft says (Rec. 259) that panning is not exact and that unless check samples are cut in the same place and same widths taken, the results will not approximate. And when sampling mine in May, 1919, and before assay returns were received on his sampling Bancroft wired Taylor (Exhibit "I", Rec. 908) that "required tonnage", i.e. 40,000 tons were exposed and he testifies (Rec. 253) he was very much surprised that assay returns showed less than half that tonnage. Plaintiff's expert Bancroft seems to have been a poorer "guesser" than Nenzel, who was not even a miner, to say nothing about being an expert.

Counsel complain (Rep. Br. 7) that we rely entirely on trial court's findings that Nenzel's statements supra were true and that we produced no witness to prove they were true. The obvious answer to this is that plaintiff's own witness Bancroft on the trial **verified Nenzel's statements on all material features** and hence there was no occasion to call witnesses to prove what was substantially and satisfactorily established, and for the same reason we can now safely rely on the trial court's finding, because **it is based on the evidence of plaintiff's own witness.**

On top of all this is the admitted fact that the very next day after the Nenzel telegram supra, Taylor writes Nenzel, (Rec. 779) "The best thing to do all around would be to close down". So even conceding away our contention that Nenzel had in no way misrepresented, the fact remains that Taylor shows by his said letter he was in no way misled or even impressed by Nenzel's said statements, giving them for the moment, the construction as claimed for by counsel.

Further it can not fairly be claimed, as counsel do, that the alleged representations of Nenzel were made **to induce** Taylor to enter into the April 2nd contract, or to enter into any contract. On January 16, 1919 defendants and Taylor executed in two documents a contract (Rec. 1148-1153) covering this same property and under which contract

they were continuously operating from January 16, 1919 to April 2, 1919, and so operating therefore, at the very time that Nenzel sent the telegram. The January 16th contract differed in its scope from the April 2nd contract, but it was nevertheless a contract and Taylor did not give defendants any notice **until some time in March** 1919 (Rec. 1130) that he would not go through with the January 16th option contract. How then could any representations made by Nenzel in February or March or made by any of the defendants **prior to such notice in March** be made to "induce" Taylor to enter into the April 2nd contract? Prior to such notice in March defendants were not expecting or contemplating any new contract or arrangement with Taylor, but were going forward on the presumption that until they were notified by Taylor, the January 16th contract was subsisting and satisfactory.

Further, is the extremely significant and important fact that Nenzel in his letter to Taylor on **March 27, 1919** (Rec. 801) states:

> "Owing to the consolidation of the Rochester properties now under way at Rochester Mr. Poole, as well as his engineering force, has been rather busy and **no accurate survey of mine development has been made since Mr. Bancroft was out here.** .We however expect to have our engineer out there within a week or so to check up development work and no doubt you will receive a report noting the

changes that have been made since Mr. Bancroft completed his work of examination."

In the first place this letter is nothing more or less than a statement to Taylor that Nenzel's previous advices of values, width of vein etc., **were mere approximations.** They could be nothing more and Taylor on March 27th must have known that they were nothing more than mere approximations, for on that day he was told by that letter that since Bancroft was there, which was about January 27th, "No accurate survey of mine development" had been made. Passing for the moment all other contentions, we say that when Taylor received the March 27th letter, and from then on, he had absolutely no right to claim reliance on Nenzel's wire of February 24th over a month prior, regarding values or widths of the vein, except as mere approximations. Indeed the March 27th letter was in effect a positive notification to Taylor that **all** figures as to values and size of vein given him since Brancroft was there, and until the making of an accurate survey, were mere estimates.

In the second place on April 2nd at Denver conference, Taylor **knew from this letter** that Poole, Murrish and Nenzel had no "exact data" as to values or size of vein at the Denver meeting, which was on March 30-31 and April 1st and 2nd. By the March 27th letter supra Taylor knew **Poole had**

made no survey because he (Poole) had been and then still was busy at Rochester. Taylor knew moreover that no "exact data" or any dependable data or detail whatever could possibly have been obtained by Poole between March 27th when Nenzel wrote, and March 29th when Poole left for Denver, because the evidence shows (Rec. 44) that Poole, Nenzel and Murrish left Lovelock for Denver on **March 29th** and so wired Taylor. Taylor knew at Denver conference that no survey had or could be made between March 27th and March 29th. Nenzel stated in the March 27th letter that the engineer (of course meaning Poole) was expected at mine "within a week or so". Taylor knew it took Bancroft ten days for a checking up from January 17th to the 27th, and must have known it would doubtless take Poole about the same time to do same work. Hence if instead of beginning on job "within a week or so" Poole had started in immediately on March 27th, he could not possibly have progressed far enough to have gotten any dependable data or detail for the Denver meeting, to attend which, Poole left Lovelock on March 29th. Poole tells us (Rec. 536) and it is no where disputed that **he was not at the mine** from the time of the Bancroft examination in January 1919 until **April 9th** of same year.

Much is sought to be made by counsel re point of "exact data, assays etc." referred to by Taylor

in his letter of March 25, 1919 (Rec. 797). But that Taylor then fully expected to have Bancroft present at meeting and that the "data" was wanted to enable Brancroft to calculate tonnage, is certain, because it was not until three days later, on March 28th, that he learns Bancroft cannot attend and he then wires defendants (Rec. 891) advising them Bancroft cannot be there and inasmuch as meeting was fully arranged for, Taylor doubtless figured that it might as well be held anyway, and so he adds in telegram, "would be glad to see Messrs. Poole, Nenzel and Murrish". Note the significant fact that now that Taylor had abandoned the idea of having Poole and Bancroft together work up a tonnage statement, he makes no suggestion in his telegram of March 28th that Poole, Nenzel and Murrish are nevertheless to bring on the data, which according to his letter of March 25th, was to have been only for Bancroft's use. Taylor tells us he relied "implicitly" on Poole, and if so he could not have wanted "exact data" to check up a man in whom he had "implicit" confidence. Besides Taylor tells us (Rec. 123-124) that **he didn't know how to calculate the quantity of ore in a mine.** In view of the foregoing we say Taylor knew on March 27th there was no exact or any dependable data re quantity or quality of ores, and that in absence of Bancroft, the meeting could accomplish nothing more than it actually did, i. e. the

formulating of a contract, with Taylor relying and expecting to have a subsequent examination by Bancroft before he (Taylor) made any cash outlay.

ALLEGED MISREPRESENTATIONS AT DENVER CONFERENCE

Counsel say (Rep. Br. 8) that Taylor's testimony that Poole, Nenzel and Murrish represented the mine contained 60,000 tons of 1.75% ore, is "corroborated". We deny that there is a scintilla of "corroboration" in the record and assert on the other hand that Taylor's said testimony is impeached out of his own mouth, and we cite:

1. Taylor swears on August 9, 1919 in his separate action at law for damages for the same alleged frauds, that Poole's representation was "**over** 60,000 tons of scheelite ore which would carry from 1.50% of tungstic acid to 1.75% of tungstic acid". (Rec. 1289-1290, 1414-1418). In his complaint in the instant case (Rec. 1133) Taylor swears that representation was—

> "x-x on said second day of April, blocked out, in sight, and ready for mining and reduction into concentrates over 60,000 tons of scheelite ore which would carry an average **of 1.75%** tungstic acid."

There is a radical difference between "1.50% to 1.75%" and "an average of 1.75%". Neither Taylor nor his counsel have even attempted to explain

why he swears at one time that Poole's representation was 1.50% to 1.75% and at another time that the representation was an unqualified "average of 1.75%".

2. On direct examination Taylor testifies (Rec. 56) that Poole's representation was that there was 60,000 tons which would "average **over** 1.75% Tungstic Acid". Again on cross-examination he says (Rec. 150) Poole's representation was—

> "He told me very positively that there was **over** 60,000 tons of ore developed in the mine which would average **over** 1.75% tungstic acid.

Then in answer to a question by the Court (Rec. 151) Taylor says Poole's representation was:

> "x-x his words would have been these, " 'There are 60,000 tons of ore that will average **over** 1.75% developed in the mine.' "

Thus we find that at one time according to Taylor it is **over** 60,000 tons; at another it is "**are** 60,000 tons". He was not sure (Rec. 152) that the words "blockel out" were used at all, "It might have been " 'developed' ". Then he says (Rec. 154) **at least** 60,000 tons. Later on, same page, he says that representation was that "there were **more** than 60,000 tons". He declares in his complaint that the representation was that the ore was "blocked out" but on the trial he will not say (Rec. 152) that the words "blocked out" were used. Again on cross-examination (Rec. 445) he will not

say whether the exact words in his complaint were used, nor whether the words "in sight" mentioned in complaint were used by Poole. He is not sure (Rec. 446) whether the words "blocked out" or "developed" were used by Poole, though he has alleged them in his complaint; that (Rec. 447) he did not remember the words "in sight" being used and he winds up (Rec. 448) by saying that he did not understand the representations to mean anything more or different, as he understood the phrases, than that there was that quantity of ore in sight.

Such evidence as the foregoing is too self-cantradictory, too doubtful, unconvincing and uncertain upon which to predict a conclusion of fraud, particularly so where it appears that Taylor had a motive for changing his testimony and allegations regarding the percentage of tungstic acid in the ore, viz, as appears in the following paragraph:

3. To prove his case he expected to use Bancroft's report. He had wired Bancroft (Rec. 906) to give him the quantity of ore in which 1.4% was recoverable; in other words 80% of 1.75% tungstic acid contents. Bancroft examined the mine under those instructions. His report (Rec. 824) would therefore be of no use whatever in the case if the representation had been that the ore "would carry from 1.50% tungstic acid to 1.75% tungstic acid" as alleged in Taylor's sworn com-

plaint of August 9, 1919, in Case No. 2263, his action at law for damages on account of the same alleged fraud. As Bancroft's report was essential to Taylor's contention in the present case, Taylor had a very strong motive for changing his sworn statement of August 9, 1919 in Case No. 2263. The fact that he did so change it is indisputable.

4. Another point against Taylor is that on his direct examination he represented to the Court that Poole gave him the lines, figures and tonnage (Rec. 47-49) reading the figures to him. That Poole read the figures from a map and memorandum, but on cross-examination Taylor was forced to admit that the figuring was done then and there and that he had participated in the figuring (Rec. 123) but declared that he made no figures of his own; **that he didn't know how to calculate the quantity of ore in a mine** (Rec. 123-124). He repeated that he didn't know how to calculate tonnage in response to a question by the court (Rec. 124), but later (Rec. 393) he flatly contradicts the sworn statement supra and says that he **was capable of figuring tonnage** on April 2nd and (Rec. 125) he was forced to admit that he might have proceeded to describe to Mr. Poole on April 2nd the method used by Mr. Bancroft in computing the quantity of ore in the mine and that Bancroft had told him (Taylor) the method.

5. The figures on Plate 5, Exhibit 15, are Tay-

lor's. The significant fact will also appear by comparison of Taylor's figures with those on Blocks "M" and "N" in Exhibit "Y", that Taylor placed the figures on Exhibit "Y".

6. The necessary inference is that on the day, whether April 1st or 2nd, that Poole and Taylor were doing this figuring, Taylor himself made the computations of tonnage; that prior to coming to Denver Poole had made no figures as to the quantity of ore in the mine; that he had no preconceived idea of representing a tonnage of 60,000 or any other specific number of tons or over to Taylor and that the figures on tonnage were the result of Taylor's own figures made by him according to Bancroft's method. Note also the significant fact that Exhibit "B" (Rec. 897) being pencil memorandum of Taylor, was prepared and used by Taylor in the negotiations at the Denver conference, although (Rec. 155-158-159-160) Taylor had entirely forgotten about this document when testifying on direct, as well as cross, until the document was produced for his inspection. And in that very memorandum, in his own handwriting, he is making use of expressions of about 25,000 and 35,000 tons of ore, and 60,000 tons which he claims Poole represented to him, is no where mentioned.

The memory of a man who fails to remember a document so important, is not apt to furnish the

"clear, unequivocal and convincing evidence" which the rule requires.

We have shown the plaintiff's own evidence is so unsatisfactory that he would not be entitled to a decree in this action even if it stood without other conradiction. . But the testimony of Messrs. Nenzel, Murrish and Poole flatly contradicts the plaintiff as to any statement whatever being made by Poole or any one about the 60,000 tons of ore averaging 1.75% being in the mine. To us it is inconceivable that their testimony is not to be treated as sufficient to completely overthrow plaintiff's self-contradictory, vague and unsatisfactory evidence.

He contradicts himself as to representations of value; now it is from 1.50% to 1.75%; next it is 1.75% and next it is "over" 1.75%. At one time he swears the representations were that the ore was blocked out, developed and in sight and next he is vague and uncertain as to whether those representations were used at all.

7. On Wednesday, September 15, 1920, on the trial in the lower court, he unqualifiedly denied that he knew how to calculate the quantity of ore in the mine (Rec. 123-124).

> "Q. I am not asking you what you might have done, I am asking the fact. Did you put any figures on the map?

A. To make any figures of my own I did not; I have never done any calculating of ore in a mine, **because I don't know how to do it.**

x-x-x

THE COURT: Q. Did you say you never had figured or calculated the amount of ore in a mine?

A. The amount of ore in a mine, **because I am not competent to calculate it,** I may have taken figures given me and multiplied areas into cubical contents."

On Friday, September 17, 1920 during said trial on cross-examination, he testified that he did the figuring in order to get the statement contained in his letter of April 17th that there was a minimum of 43,000 tons of ore in the mine and that he was capable of figuring tonnage on April 2nd.

"Q. You are capable of doing it (figuring tonnage) aren't you?

A. I am.

Q. And were on April 2nd, were you not?

A. I was."

8. Again (Rec. 59-60) Taylor in his direct examination testified:

"Q. Would you have entered into this contract, Mr. Taylor, except for the written and other representations which were made to you, as you have heretofire testified?

A. I should not."

But later, on cross-examination, Taylor denies truth of his statement supra as to his attitude regarding entering into the contract (Rec. 118).

"Q. Can you give us the substance of what

you said as to what you were willing to do on that Sunday? (March 30),

A. I was willing in a general way at that time to make a contract according to the terms that were finally arranged."

The point here is that on that Sunday, and admittedly two or three days **before** Taylor claims Poole made any representations whatever, Taylor was willing to make a contract the same, or substantially the same, as Exhibit "C". But if so, how can he be believed, when he says, supra, that he would not have entered into the contract but for the written and other representations, and when he says he relied "implicitly" upon Poole's representations as inducement thereto.

His own testimony is too contradictory, too vague and uncertain to measure up to his allegations of fraudulent representations. There is, therefore, no "clear, unequivocal and convincing" evidence whatever to prove that such representations were ever made.

"To establish fraud, the proof must be clear, unequivocal and convincing."

In Re Hawks (D. C.) 204 F., 309-316, and U. S. Supreme Court and other Federal cases cited to that point in the opinion.

Counsel make attack (Rep. Br. 9-10) upon Mr. Murrish, all because Mr. Murrish at first, and erroneously, identified while testifying (Rec. 638) the paper marked Exhibit "Z" (Rec. 933) as one

that was shown to himself and others at a meeting in San Francisco about June 4-5, 1919. Later (Rec. 770-774) Mr. Murrish explains the appearance of another paper, but similar in appearance, contents etc. that was actually and admittedly exhibited at that meeting. Note the trivial foundation of the attack upon credibility and note also that the identity of the papers was of no importance in the case and so stated (Rec. 770) in the record at the time. Nor was the trial court in any wise impressed (Rec. 772) with it. Impeachment can not be had on such utterly collateral and immaterial matter.

Nor is the criticism of Poole (Rep. Br. 11) correct that he couldn't remember if at San Francisco conference he was charged with having represented to Taylor at Denver meeting on April 2nd that the mine contained 60,000 tons. Poole flatly denies that at San Francisco conference any charge was made by any one that he had represented a 60,000 tonnage in mine on April 2nd. His testimony is that he is positive he never acquiesced (Rec. 510-511) in any statement at San Francisco conference that he had ever representd to Taylor that there were 60,000 tons ore in the mine, and in effect states merely that he can not be positive that mention of some tonnage may have been made by others at that conference. Murrish corroborates Poole (Rec. 636) that Poole stated at San

Francisco meeting that he never told Taylor there was 60,000 tons ore in mine.

Counsel say (Rep. Br. 11) that Murrish and Nenzel admitted that the 60,000 tons representation was made. This is far from correct. What Murrish and Nenzel did say (Rec. 610-634) is that at San Francisco meeting about June 4, 1919, Jackson in opening conversation stated, "You people told Mr. Taylor at Denver that there are 60,000 tons of ore in the mine". Murrish promptly challenged Jackson's statement (Rec. 635-636) " 'I never made such a statement' " and the minute I finished Mr. Nenzel got up and he said, " 'I never made such a statement as that either x-x-x I never made such a statement as that' ". Counsel question Poole's veracity (Rep. Br. 11-12) re no 60,000 tons representations being made by him at Denver meeting, because as counsel argue, in face of Taylor's letter suggesting Denver conference and requesting "exact data as to development work, assays, etc." so as to work up the tonnage and because of Taylor's statement to Poole at conference that he (Taylor) wanted deal on banking basis, and counsel conclude from this that Poole must have made representations to Taylor as to tonnage in mine.

But this argument and conclusion is wholly unfounded. We know (Rec. 801) that Taylor knew on March 27, 1919 that Poole hadn't been at mine

at all from January 27th, 1919, date of Bancroft's first examination. We know that on March 27, 1919 Taylor was informed by Nenzel that no "exact data" was then available. We know Taylor then knew no such data would or could be furnished for use at Denver conference on March 30th or for a week or so later. Nenzel's said letter of March 27th (Rec. 801) saying they had "no accurate survey of mine development" was obviously in answer to Taylor's letter of two days before on March 25th (Rec. 798) suggesting that Poole come to Denver "bringing exact data as to development, assays etc." Poole couldn't have made any representation as to tonnage because he had not been to the mine since Bancroft made his first examination, which was finished January 27, 1919, and Taylor knew then from Nenzel's said letter of March 27th that no accurate survey or data was then available. Also when Taylor made the suggestion March 25th that Poole come to Denver with exact data etc., Taylor expected to have Bancroft check up the whole business, because Taylor uses the words, "So that he (Poole) and Bancroft together can work up a definite tonnage." On March 28th at 12:10 P. M. Nenzel wired Taylor (Rec. 803) that on the following day he (Poole and Murrish) are leaving Lovelock for Denver. Later at 1:55 P. M. on same day Taylor wires (Rec. 891) to Tungsten Company that Bancroft can not be at Denver

conference, but adds that he (Taylor) will be glad to see Messrs. Poole, Murrish and Nenzel. This shows that the "exact data" was in the first place intended by Taylor **for use by Bancroft** and that Taylor was thereafter informed by Nenzel that no exact data or any dependable data was available, and then Taylor learned that Bancroft would not attend. Taylor then apparently concludes to meet with Poole, Murrish and Nenzel any how, but it is safe to assume that after Taylor learned from Bancroft that the latter could not attend, and after he learned from Nenzel that no accurate data as to mine development was available, that he conference, so far at least as Taylor was concerned was considered as a very general and informal matter. Taylor's evidence shows that he did not expect, and did not rely on any "exact data, assays etc." or on any representations by Poole, because he tells us (Rec. 118) that on **Sunday, March 30th,** which was before the actual conference was had, and admittedly two or three days before the day when Taylor claims Poole misrepresented, he (Taylor) "was willing in a general way **at that time to make a contract according to the terms that were finally arranged.** That is to say, Taylor's mental attitude towards the business was that without any data brought to Denver by Poole, and without any representations re 60,000 tons quantity or 1.75% quality,

Taylor on March 30th was willing to make the contract that was eventually made three days later. This simply means he was relying on Bancroft and a subsequent examination to be made by him.

And the very fact that according to Poole (Rec. 480-576-579) Taylor said at Denver conference that he (Taylor) "hoped to interest some New York Trust Company on a banking basis" is to our mind proof conclusive that, passing question of what Poole did or did not say as to tonnage and values, Taylor did not place any reliance whatsoever on what may have been said. If Taylor wanted to present deal in New York "on a banking basis" he surely knew he could not afford to accept representations of vendors alone.. Of course he intended from the start to have the services of Bancroft, a supposedly disinterested and admittedly competent engineer. And after Taylor told Poole that he "hoped to interest capital on a banking basis" there could be little or no occasion for Taylor or Poole to discuss tonnages or values except in the most general way, because nothing that either could say or do would put deal "on a banking basis". Hence Poole's testimony that no talk as to total tonnages or any definite values was had at Denver conference, is shown to be the obvious and natural thing under the circumstances.

Counsel attempt (Rep. Br. 13) to explain Taylor's apparent inconsistency in claiming Poole represent-

ed 60,000 tons and Taylor's alleged implicit reliance thereon, and Taylor thereafter representing to Crucible Steel Co. and to McKenna that the assured minimum tonnage was 43,000 tons, and counsel say that Taylor's every reference to tonnage other than 60,000 is related to a statement that the tonnage mentioned will secure the loan he was seeking to make.

But this does not explain at all, because no borrower seeking to make a loan fails to present proposition **as attractive as possible,** and sertainly 60,000 tons here is more attractive security than only 43,000 tons would be. Besides why did Taylor say 43,000 tons assured in presenting deal as safe investment to Crucible Steel Co. and to McKenna, when in his figures on April 2nd (Exhibit "B") (Rec. 897-899) he says investment safe with only 25,500 tons at one market, or 35,400 tons on another market? Presumably he used the market as then prevailing, as we find Taylor himself (Rec. 926-927) refers to the market as being $11.00 per unit. At this price very much less than 25,000 tons of 1.75% ore would be sufficient to show safe investment according to Taylor.

But a still more fatal objection to this "explanation" is that Taylor **did not take the 43,000 tons figure** on account of any belief or assumption on his part that it represented a safe investment, because about ten days **after** writing the said 43,000

tons assured minimum letter, Taylor and Thane prepare a prospectus, Exhibit "U", (Rec. 924) and in this Taylor says, the ore reserve is only 41,000 tons, and so far from even that amount being "assured" he says that the 41,000 tons is only **"indicated"**. The 41,000 tons only **"indicated"** certainly did not and could not relate to tonnage required to make a loan safe. Taylor in that same document, Exhibit "U", says (Rec. 928) that the "common shares are an attractive proposition". The whole document shows unmistakably that it was prepared for promotion purposes and not to borrow money, and Taylor elsewhere testifies that a number of copies of it were prepared and distributed among prospective investors.

Counsel say (Rep. Br. 14) that if Taylor wanted to fabricate and make his case correspond with figures presented by him to the Crucible Steel Co. and others, nothing could have been easier for him—the complaint and proof would then have been 40,000 tons and not 60,000 tons. Not so, because complaint and evidence would then have to be at least for 43,000 tons, and to square with the Exhibit "U" (Rec. 924) prospectus prepared by Taylor and Thane on train about April 27th, the complaint and evidence would have to be on basis of not to exceed 41,000 tons and that amount only "indicated" and to square with Exhibit "B" (Rec. 899) where Taylor computed tonnage at 25,-

500 to 35,400 tons, the complaint and evidence would again have to be changed.

TAYLOR IS NOT CORROBORATED

In reply brief, page 15, counsel say Taylor is corroborated by alleged fact that the defendants' mine map, Exhibit "Y" contains figures that are also found on plate 5 transferred to it from Exhibit "Y". The answer to this is that the figures on plate 5 are Taylor's and by comparison it will be found that the figures on blocks "M" and "N" on Exhibit "Y" **are also Taylor's.**

Counsel again revert (Rep. Br. 16) to the claim that Poole, Murrish and Nenzel at San Francisco were charged with having misrepresented mine conditions to Taylor re 60,000 tons, and counsel say the defendants "failed to deny" having so misrepresented. We do not understand why counsel make this statement. Poole says (Rec. 511-512) that he never acquiesced or agreed to any statement at San Francisco meeting that he had represented 60,000 tons to Taylor. Murrish says (Rec. 636) that Poole then and there denied ever having made any such statement, and that (Rec. 635):

> "I then took issue with Mr. Jackson and I said, " 'I made no such statement as that x-x-x I never made such a statement' "; that Nenzel then got up and he said," 'I never made such a statement as that either.' "

Murrish (Rec. 634) says that he never nodded his assent to Jackson's claim that defendants had so stated at Denver. Nenzel says (Rec. 610) he never nodded his assent and also that Poole stated at meeting (Rec. 613) he never made any such representation.

Counsel says (Rep. Br. 20) that the Court should bear in mind that Taylor's testimony re Poole's alleged 60,000 ton statements, were statements made to Taylor "by a mining expert in charge of operations at the mine, and who had brought, in response to Taylor's request, exact data as to development work, assays etc.". The fact is that Poole was not in charge of operations at the mine in any practical sense at all, as it is undisputed that **he had not even been at the mine** from time of Bancroft's first examination January 27th down to the very time of conference with Taylor at Denver, and further that Taylor at said conference **then and there knew** that Poole had not been at mine, and that no accurate survey had been made or any exact or dependable data obtained since January 27th.

TAYLOR RELIED ON BANCROFT

In reply brief, page 21, counsel argue that Taylor in entering upon contract, placed no reliance on Bancroft or upon examination to be subsequently made by him. At pages 24 to 26 of our first

brief herein, we covered this feature at length. The evidence shows among other things that on April 3rd, the **next day after contract was signed,** Taylor wired Bancroft (Rec. 272) and this fact and the contents of the wire were so significant as to lead the trial court to say (Rec. 275) that the telegram tended to show Taylor was relying on Bancroft as his expert. Poole tells us (Rec. 514) that Taylor told him at Denver conference that "he was going to rely absolutely on Mr. Bancroft". Nenzel says (Rec. 637) the matter of Bancroft making an examination was discussed by Poole and Taylor at that conference. The evidence, as well as the physical facts of the case, is overwhelmingly against Taylor's contention that he did not rely on Bancroft and an examination to be subsequently made by him (see evidence excerpted on point in our former brief, pages 24-31).

But counsel say (Rep. Br. 21) that Taylor expended substantial sums of money "before any **report** had been received from Bancroft". We say such expenditures are immaterial for any purpose and that only expenditures made **before Taylor determined to have Bancroft make examination,** could have any bearing on issue of reliance. Taylor tells us (Rec. 178-179, 226-289) that about May 1st, or a few days before, it was determined to have Bancroft examine the property. Elsewhere he puts it

May 9th (Rec. 223-224), but the record fails to show any expense incurred **before such determination,** whether we take the one date given by him or the other, except possibly a portion of expense of the Taylor trip with Thane to New York about April 27th, but inasmuch as Taylor admits (Rec. 173) he had other business taking him to New York about that time, it is not clear just how that expense item can equitably cut any figure in this case. Counsel's statement (Rep. Br. 21-22) that "much" of the alleged $6700.00 expenditures referred to, was made **before** Bancroft was **employed,** is simply confusing the issue. The point is that actual **employment** is not the thing; it is the **determination** or **decision** of Taylor to employ Bancroft or some other engineer, that is determinative here, because Taylor himself tells us (Rec. 179-180) that all expenses incurred by him after it was determined to have Bancroft examine the property, were in reliance on the results of Bancroft's examination. Exhibit 27 (Rec. 833) is an itemized statement of plaintiffs alleged expenses, and the earliest item is dated **May 16th** and of course admittedly some time **after** Taylor had determined to have Bancroft examine the property, and also **after** Bancroft had **actually been employed.** And when Taylor on cross-examination (Rec. 431) was asked to state any item of expense incurred by him prior to the determination to send Bancroft out, Taylor says, "I could not possibly do that",

and added, (Rec. 432) "I could not give an approximation thereof", and says, (Rec. 433) "I could not give you anything but a guess, I am sorry", and it finally simmered down that his best "guess" (Rec. 434) was $250.00, and then he adds (Rec. 436-437) he had other business in New York to consult Attorney Jackson about, and elsewhere (Rec. 173) he tells us he had other business taking him to New York at that time. Even prior to the April 2nd contract and at least as early as March 25, 1919, he had formed the definite purpose of going to New York in the latter part of April just as he did go on this trip, for on March 25th he writes Friedman, Exhibit 12, (Rec. 798):

> "I believe that on some modified form of option I could induce him (a bank president in New York) to go aheadwhen I go East again which will be the latter part of April."

Taylor's attorney Jackson was consulted by Taylor in May 1919 regarding two other contracts, wholly aside from the subject of contract Exhibit "C", and when Taylor was asked if the attorney's fee brought into this case was not paid on account of all three contracts, Taylor says (Rec. 437) "I could not tell you, sir". Note that he alleges and elsewhere testifies that the said attorney's fee item was wholly incurred in endeavoring to carry out this contract, Exhibit "C".

At page 22, reply brief, counsel say it is "undisputed" that Bancroft was not employed at in-

stance or initiative of Taylor. We deny this. True, Taylor so testified in effect, but according to Poole, Taylor stated at Denver conference he intended to have Bancroft examine the property, and Nenzel tells us he heard Taylor and Poole discuss the subject of Bancroft making an examination of the property. Admittedly Taylor wired Bancroft the very next day (Rec. 915) i. e. April 3rd, after Exhibit "C" was executed. It will be noted that in the copy of this telegram in evidence one inch thereof was torn out so we do not know all of its contents, but concerning this telegram the trial court used significant language, as follows:

> "I think it tends to show that the plaintiff was relying on this expert at the time the telegram was written." (Rec. 275).

Moreover Taylor himself tells us that before May 1st or May 9th, whichever date it was that it was finally determined to send Bancroft, the sending of another engineer had been discussed. But as we contend the question of as to whose initiative it was that Bancroft was brought in, is absolutely immaterial, because in addition to other matters discussed we have Taylor's statement (Rec. 225-226) that on train going east (which was about April 27th) Thane insisted on Bancroft checking up tonnage, values etc. and that he (Taylor) "assented."

LEGAL CONTENTIONS OF APPELLEES IN FORMER BRIEF NOT CONTROVERTED

Taylor's reply brief was filed and served after service of our former brief, as well as after the oral argument. In our former brief (Pages 52-55) and because of appellant's admission of a "sharp conflict in the testimony"; of their statement that "Taylor's case rests on the truth of his allegations" that "plaintiff now comes before this court taking issue with the trial court on these questions of fact" ets., we contended, citing authorities, that the finding of the trial court was unassailable. Appellant's reply brief is silent both as to the application of the rule as well as to the question of the authorities cited supporting the rule. So with our contention (Former Brief, p. 55-56) that to establish fraud, the proof must be clear, unequivocal and convincing.

More particularly significant is the silence of appellant in Reply Brief, as to our contention advanced in former brief (pages 60-62) that appellant's assignments of error are each and all fatally defective. In addition to the cases cited on this point by us in former brief, we wish to add:

Florida Central Co. v. Cutting (C. C. A.) 68 Fed., 586-587.

Hart v. Bowen (C. C. A.) 86 Fed., 877-882.

Appellant's failure to in any way reply to the

legal contentions would seem tantamount to an admission that such contentions are correct in law. There can hardly be any question of the rules of law so contended for being applicable to the facts. the rules of law so contended for being applicable to the facts.

Respectfully submitted,

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